SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

v.

THEOPHILIS SHICKEL PAINTER *et al.*,
Respondents.

On a Writ of Certiorari to the
Supreme Court of the State of Texas

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND B'NAI B'RITH (ANTI-DEFAMATION LEAGUE) AS *AMICI CURIAE*

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICI	1
OPINIONS BELOW	3
JURISDICTION	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
POINT I. The validity of racial segregation in public educational facilities has never before been decided by this Court	8
POINT II. Racial segregation in public educational institutions is an arbitrary and inadmissible classification under the equal protection clause of the Fourteenth Amendment	12
POINT III. The "separate but equal" doctrine originated by this Court in Plessy v. Ferguson had no basis in then-existing legal precedent, and is an anachronism in the light of present-day legal and sociological knowledge	17
POINT IV. Segregation necessarily imports discrimination and therefore violates the requirements of the Fourteenth Amendment	28
(1) Equality is in fact impossible in racially segregated public educational facilities	29
(2) The economic, sociological and psychological consequences of racial segregation in and of themselves constitute a discrimination prohibited by the equal protection clause of the Fourteenth Amendment	35
CONCLUSION	39
APPENDIX	40

Table of Cases

	PAGE
Acheson v. Murakami, 176 F. (2d) 953	17
Atchison, Topeka etc. Ry. v. Mathews, 174 U. S. 96	21
Berea College v. Kentucky, 211 U. S. 45	9
Bryant v. Zimmermann, 278 U. S. 63	25
Buchanan v. Warley, 245 U. S. 60	14, 24, 26
Butler v. Perry, Sheriff of Columbia County, Fla., 240 U. S. 328	24
Chesapeake & Ohio Ry. v. Kentucky, 179 U. S. 388	21
Chesapeake, O. & S. Ry. Co. v. Wells, 85 Tenn. 613	19
Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185	19
Chiles v. Chesapeake & O. Ry. Co., 218 U. S. 71	22
Civil Rights Cases, 109 U. S. 3	18
Clyatt v. U. S., 197 U. S. 207	22
Colgate v. Harvey, 296 U. S. 404	25
Cumming v. County Board of Education, 175 U. S. 528	9
Day v. Owens, 5 Mich. 520	19
Fisher v. Hurst, 333 U. S. 147	11
Gong Lum v. Rice, 275 U. S. 78	2, 10, 11, 25
Hall v. DeCuir, 95 U. S. 485	8, 9, 18
Heard v. Georgia Ry. Co., 1 I. C. C. R. 428	20
Heard v. Georgia Ry. Co., 3 I. C. C. R. 111	20
Hill v. Texas, 316 U. S. 400	14
Hirabayashi v. U. S., 320 U. S. 81	13, 16
Houck v. Southern Pac. Ry. Co., 38 Fed. Rep. 226	19
Korematsu v. U. S., 323 U. S. 214	13, 16

PAGE

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 12
Logwood etc. v. Memphis etc. Ry. Co., 23 Fed. Rep. 483 19, 20
Louisville, New Orleans, and Texas Ry. Co. v. Mississippi, 133 U. S. 587 18

McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151 11, 23
McGuinn v. Forbes, 37 Fed. Rep. 639 19, 20
Missouri ex rel. Gaines v. Canada, 305 U. S. 337 10, 11, 25

Nixon v. Herndon, 273 U. S. 536 14

Ohio ex rel. Clarke v. Deckenbach, 274 U. S. 392 13
Oyama v. California, 332 U. S. 633 13, 29

Pace v. Alabama, 106 U. S. 583 21
Patsone v. Penna., 232 U. S. 138 13
People v. King, 110 N. Y. 418 20
Perez v. Sharp, 32 Calif. (2d) 711 21
Plessy v. Ferguson, 163 U. S. 537 6, 7, 9, 11, 18, 20, 21, 22, 23, 24, 25, 26, 27, 37

Shelley v. Kraemer, 334 U. S. 1 15, 35
Sipuel v. Board of Regents of the University of Oklahoma, 332 U. S. 631 11
Smith v. Allwright, 321 U. S. 649 14
Strauder v. West Virginia, 100 U. S. 303 14

Takahashi v. Fish and Game Commission, 334 U. S. 410 14
Terminiello v. City of Chicago, 337 U. S. 1 17
The Roanoke, 189 U. S. 185 22
The Sue, 22 Fed. Rep. 483 19, 20
Thomas v. Collins, 323 U. S. 516 13

PAGE

West Chester etc. Ry. v. Miles, 55 Penn. St. 209 19
Westminster School District v. Mendez, 161 F. (2d) 774 2

Yick Wo v. Hopkins, 118 U. S. 356 14
Yu Cong Eng v. Trinidad, 271 U. S. 356 14

United States Constitution

Fourteenth Amendment 5, 6, 7, 8, 11, 12, 15, 18, 19, 21, 22, 23, 24, 25, 29, 35, 37
Interstate Commerce Clause 18, 21, 22
Thirteenth Amendment 22, 24

Federal Statutes

Interstate Commerce Act, Sec. 3 20
Federal Civil Rights Act 18

State Constitutions and Statutes

Constitution of Texas, Art. VII, Sec. 7 28
Oklahoma "Separate-coach statute" 23
Texas Revised Civil Statutes, Title 49, Chap. 19, Art. 2900 28

Other Authorities

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PAGE

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Embree, Edwin R., Brown America (1931) 33

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PAGE

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Segregation in Public Schools—A Violation of "Equal Protection of the Laws", 56 Yale L. J. 1059 (1947) 38

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BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND B'NAI B'RITH (ANTI-DEFAMATION LEAGUE) AS *AMICI CURIAE*

Interest of the *Amici* *

This brief is filed, with the consent of both parties, on behalf of the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith.

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* The Appendix contains a description of the organizations appearing as *amici curiae*.

Both of these organizations are dedicated to the preservation of democratic rights guaranteed all citizens by our Federal Constitution. Each has long since recognized that the invasion of the rights of any individual or group on the basis of race undermines the foundation of rights guaranteed to all groups in our democracy.

The present case causes us deep concern because the pattern of discrimination in segregated educational facilities has deprived millions of Americans of equality of opportunity and has perpetuated an abhorrent caste system. In the light of sociological and psychological insights gained from experience with segregated school systems it is clear that compulsory segregation results in physical, social, intellectual and economic inequality for the Negro and any other segregated group. These inequalities give rise to and strengthen the effect of inequalities in other areas of human activity, for such inequalities compound each other.

Beyond this, we are concerned with the fact that segregation has become an effective threat to the very foundation of our democratic way of life. If a State can require segregation in education for Negroes, it can also require it for Chinese, see *Gong Lum* v. *Rice*, 275 U. S. 78, for Mexicans, see *Westminster School District* v. *Mendez*, 161 F. (2d) 774, or for any arbitrarily selected group. Segregation maintains the racist doctrine that undesirable social traits and inferior mental capacities inhere not in the individual, but in the group. This concept must be excised from the fabric of our society. Certainly a first step is to remove it from our law.

It should be stated finally that we are fully aware that implicit in the defense by some of segregation and of the "separate but equal" doctrine is the fear that a destruction of the barriers of segregation will give rise to increased racial tensions. We believe that the ugly prejudices which create such tensions batten on segregation.

A decision by this Court eliminating racial segregation in education will strengthen the democratic relationships among the various groups in our population. This issue must be faced honestly and boldly.

Opinions Below

The judgment of the Supreme Court of the State of Texas refusing the application for writ of error to the Court of Civil Appeals for the Third District, dated September 29, 1948, without opinion, appears on page 466 of the record. The order, dated October 27, 1948, overruling the motion for a rehearing, without opinion, appears on page 471 of the record. The opinion of the Court of Civil Appeals, dated February 25, 1948, appears at page 445 of the record, and that of the District Court of Travis County, dated June 17, 1947, is reported at page 438.

Jurisdiction

Jurisdiction is invoked under Title 28, United States Code, section 1257 (3).

Statement of Facts

The petitioner in this case, Heman Marion Sweatt, sought admission to the School of Law of the University of Texas. He concededly met all of the academic qualifications, but the authorities of the University denied him enrollment because he is a Negro.

In the State of Texas in accordance with statutory and constitutional provisions the maintenance of separate schools for whites and Negroes is compulsory. The

University of Texas Law School which Sweatt sought to enter is maintained for white students only.

On May 16, 1946, Sweatt brought an action in mandamus in the District Court of Travis County, Texas, to compel the members of the Board of Regents of the University of Texas, and others, to admit him as a student. That court, after a hearing, entered an order finding that Sweatt was denied the equal protection of the laws since no provision had been made by the State of Texas for his legal training.

The District Court did not, however, grant the writ of mandamus but rather adjourned further consideration of the action until December 17, 1946, giving the respondents six months time within which to produce a course of legal instruction substantially equivalent to that provided for white students at the University of Texas.

At the second hearing on the application for the writ, which took place December 17, 1946, the State of Texas attempted to show the availability of a law school for Sweatt by presenting to the court a copy of a resolution adopted November 27, 1946, by the Board of Directors of Texas A. & M. College to the effect that if Negro applicants for law school training were to present proper evidence of the required academic qualifications they would be admitted to a law school for Negroes to be established in Houston, Texas for the semester beginning February 1947. There was no evidence produced, however, to show that a law school for Negroes had actually been established.

On the basis of this representation at the December 17th hearing the court entered a final order denying the petition.

This judgment was set aside without opinion by the Court of Civil Appeals, and the cause was remanded for further proceedings without prejudice to the right of any party.

Meanwhile, the State authorities established a separate Negro law school in premises rented in an office building in Austin, Texas, for a period to begin sometime in the latter part of February or early March 1947, and to end on August 31, 1947. A description of the facilities provided for this law school is given in Point IV of the argument, *infra*.

In May 1947, by amendment and supplementation of the original pleadings, the petitioner and respondents joined issue on the question whether the establishment of this separate Negro law school during the period of proceedings on the appeal was sufficient compliance with the equal protection clause of the Fourteenth Amendment and, therefore, whether the refusal to admit Sweatt to the School of Law of the University of Texas was arbitrary and in violation of the Fourteenth Amendment.

The trial on this issue was held before the district court sitting without a jury. Judgment was rendered for respondents. This was affirmed on appeal to the Civil Court of Appeals. Writ of error was refused by the Supreme Court of the State of Texas.

Summary of Argument

The following arguments will be urged in this brief:

I. This Court has never before decided on the constitutional validity of racial segregation in public education. The Court has, in *dictum*, signified its approval of the "separate but equal" doctrine as applied to education, but has never ruled specifically whether racial segregation in education is within the "equal protection of the laws" provision of the Fourteenth Amendment.

II. Racial segregation in public educational institutions is an arbitrary and inadmissible classification under the "equal protection" clause of the Fourteenth Amendment.

This Court has ruled that legislative classification based on race alone is a denial of equal protection except where the national safety is imperilled or there is a pressing public necessity. Racial segregation in public educational facilities is clearly not accompanied by any "pressing public necessity" and must, therefore, fall under the ban of the Fourteenth Amendment.

III. The "separate but equal doctrine" originated by this Court in *Plessy* v. *Ferguson* had no basis in then existing legal precedent and is an anachronism in the light of present-day legal and sociological knowledge.

The cases cited by the majority of this Court to support its decision in the case of *Plessy* v. *Ferguson* set no precedent on the questions under consideration in the case. Although many cases have since cited the "separate but equal" doctrine of the *Plessy* case it has never since been re-examined and affirmed by this Court. Neither is the racial classification embodied in the statute under consideration justifiable as an exercise of police power.

IV. Racial segregation in public education results in inequality and is a form of discrimination.

This Court has recently stricken down many forms of discrimination in such fields as housing, ownership of land, eligibility for employment and in jury duty. The Court has particularly opposed discriminatory practices "rooted deeply in racial, economic and social antagonisms."

The "separate but equal" doctrine urged here stresses that separation is not discrimination where physically

equal facilities are provided, but the "separate but equal" doctrine is a fiction which must be pierced. Segregation results in social, intellectual, physical and economic inequality and hence is discriminatory.

Social inequality is an inevitable concomitant of segregation. The premise of *Plessy* v. *Ferguson* that segregation does "not necessarily imply the inferiority of either race to the other" is invalid.

Intellectual inequality results where students in one racial group are separated from others so that they cannot share in intellectual discussion in law classes, in law review work, in moot courts and the like.

The physical equality supposedly guaranteed by the "separate but equal" doctrine does not exist in fact. The physical facilities afforded white students in Texas are far superior to those provided for Negroes, and the University of Texas Law School for white students is incomparably superior to the law school provided for Negroes. Nor can physical equality in dual school systems be achieved in the future.

Economic inequality also inheres in racial segregation in education. The legal profession is peculiarly one in which social relationships lead to economic opportunities which shape a lawyer's career. Negroes denied the fullest possible social relationships are deprived of economic rights.

Therefore, this Court is asked to overrule its decision in the case of *Plessy* v. *Ferguson* and to hold that racial segregation in public education is violative of the equal protection clause of the Fourteenth Amendment.

POINT I

The validity of racial segregation in public educational facilities has never before been decided by this Court.

This Court is here asked to determine the validity of constitutional and statutory provisions of the State of Texas which require racial segregation in public educational facilities. Despite the transcendent importance of the question, this Court has not yet ruled directly on the constitutionality of segregation in public education. It has decided similar problems, such as the validity of racial segregation in transportation and in housing. It has decided matters relating to educational segregation where the validity of segregation was assumed but not in question. But this Court has never before ruled flatly and specifically on the validity under the Fourteenth Amendment of racial segregation in education.

Following the adoption in 1868 of the Fourteenth Amendment, the earliest case in which some reference was made by this Court to racial segregation in education was *Hall* v. *DeCuir*, 95 U. S. 485, which involved the validity of a State statute prohibiting segregation by race in public carriers. That statute was declared unconstitutional as an improper regulation of foreign and interstate commerce. In a concurring opinion, Mr. Justice Clifford reviewed with approval the conclusions of a number of State cases which had upheld the reasonableness of racial segregation in education and stated in dictum that segregation in the public schools did not violate the Fourteenth Amendment if physically equal school facilities for Negroes were preserved.

In 1896 this Court decided *Plessy* v. *Ferguson*, 163 U. S. 537, which sustained the constitutionality of a Louisiana statute which required public carriers to furnish separate but equal coach accommodations for whites and Negroes. The Court cited with approval several ancient State cases which had held that a State could require the segregation of racial groups in its educational system provided that facilities for all groups were physically equal.*

The constitutionality of "separate but equal" facilities in education was concededly not before the Court in either the *Hall* or the *Plessy* cases. Yet, although there was no basis for a discussion of equal facilities in education, and in spite of the fact that the statements of the Court were dicta, the *Plessy* case was subsequently employed by State and lower federal courts to proclaim the legality of segregation in educational institutions. See cases cited in 46 MICH. L. REV. 639, 643 (1948).

Three years later, this Court decided *Cumming* v. *County Board of Education*, 175 U. S. 528. There, an injunction was sought to restrain the board of education from maintaining a high school for white children where none was maintained for Negro children. The State court had upheld the board of education, saying that its allocation of funds did not involve bad faith or abuse of discretion. In upholding the decision of the State court, Mr. Justice Harlan stated expressly that racial segregation in the school system of the State was not in issue.

The next case before this Court which involved compulsory educational segregation was *Berea College* v. *Kentucky*, 211 U. S. 45, wherein the validity of a State statute which prohibited domestic corporations from teaching white and Negro pupils in the same private educational institution was attacked. While the scope of the statute was

* See our fuller discussion of the *Plessy* case, Part III, *infra*.

broad enough to include individuals as well as corporations, this Court said, at 54,

> —it is unnecessary for us to consider anything more than the question of its validity as applied to corporations. * * * Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.

This Court supported the reasoning of the State court that the statute could be upheld as coming within the power of a State over one of its own corporate creatures. The statute was considered not to have embodied a deprivation of property rights. The rights of individuals were not considered.

Not until 1927 did racial segregation in educational institutions again become the subject of controversy before this Court. In *Gong Lum* v. *Rice*, 275 U. S. 78 a Chinese contested the right of the State of Mississippi to exclude her from the high school for whites, and to assign her to the colored school under the State's segregated school system. The State contended that under its constitutional provision requiring that separate schools be maintained for children of the white and colored races, the plaintiff could not insist on being classed with the whites and that the legislature was not compelled to provide separate schools for each of the colored races.

The issue of segregation was not presented in this case. The plaintiff accepted the system of segregation in the public schools of the State, but contested her classification within that system. Since she did not contest the practice of segregating Negroes from whites, segregation was not in question.

Nor was the validity of segregation before the Court in the case of *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 in which the petitioner was refused admission to the University of Missouri Law School, a State-supported institution, solely because he was a Negro. The State, having

no law school for Negroes, sought to fulfill its obligation to provide equal educational facilities by paying the petitioner's tuition for a legal education in another State. This the Court held did not satisfy the constitutional requirement. It said that the petitioner was entitled to be admitted to the University of Missouri Law School in the absence of other and proper provision for his legal training within the State of Missouri.

Again, the issue was not segregation, but whether an otherwise qualified Negro applicant for law training could be excluded from the only State supported law school. This Court assumed that the validity of equal facilities in racially separate schools was settled by earlier decisions and cited the *Plessy* case and *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, both of which involved segregation only in public carriers, and the *Gong Lum* case. But the validity of a state requirement of segregation was not decided.

The most recent consideration of this problem was in 1948 in the University of Oklahoma Law School case, *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U. S. 631. This Court, in a per curiam decision, said that the State must provide law school facilities for the Negro petitioner "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group" (at 633). The facts in the *Sipuel* case were similar to those in the *Gaines* case, in that no law school facilities were afforded Negroes by the State of Oklahoma.

Segregation was not at issue in the *Sipuel* case. This Court stated in *Fisher* v. *Hurst*, 333 U. S. 147, 150, that:

> The petition for certiorari in Sipuel v. University of Oklahoma did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here.

In no case previously before this Court in which racial separation in education has been the subject of comment in an opinion has there been a record presented upon which the Court felt compelled to take cognizance of the issue of segregation *per se* in State supported educational institutions.

The record in this case presents the issue squarely:

Does segregation in State supported educational institutions meet the requirements of the "equal protection" clause of the Fourteenth Amendment?

POINT II

Racial segregation in public educational institutions is an arbitrary and inadmissible classification under the equal protection clause of the Fourteenth Amendment.

In determining whether a particular legislative classification meets the requirements of the "equal protection" clause of the Fourteenth Amendment, this Court has applied two tests: first, whether the classification statute has a constitutionally permissible objective, and, second, whether the classification scheme is based upon differences between the groups classified which bear a substantial relation to an objective of the legislation.

Before this Court would invalidate legislative classification it has been necessary to show a lack of any possible grounds for belief in the ability of the statute to attain desired and legitimate ends. This rule was applied in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79, in the following terms:

> • • • one who assails the classification • • • must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Moreover, the presumption of constitutionality and the rational basis test which have been applied to classification statutes have been decisive to the degree that the Court has refused to invalidate such statutes unless there was a clear showing that the legislature was "manifestly wrong" in its action. See *Ohio ex rel. Clarke* v. *Deckenbach*, 274 U. S. 392, 397; *Patsone* v. *Penna.*, 232 U. S. 138, 144.

While these tests have always been, and are operative as to other legislative classifications, the history of the Court's rulings involving the constitutional validity of governmental action based upon racial distinctions reveals that as to cases concerned with racial discrimination and other civil rights and liberties, the above presumptions are generally not applied. *Thomas* v. *Collins*, 323 U. S. 516.

The propriety of classification on the basis of race has been the subject of separate and special vigilance. The Court has increasingly in recent years made searching inquiry into the sufficiency of any grounds asserted as justification for governmental distinctions based on race or color. It has stated that "all legislative restrictions which curtail the civil rights of a single race group are immediately suspect." *Korematsu* v. *U. S.*, 323 U. S. 214, 216. "Only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause." *Oyama* v. *California*, 332 U. S. 633, 646. This Court has recognized that, as a general rule,

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100.

In the application of these principles, the Court has consistently declared governmental classification based on race or color to be constitutionally invalid.

This Court has struck down governmental action of a discriminatory character relating to the exclusion of Negroes from grand and petit juries. *Strauder* v. *West Virginia*, 100 U. S. 303; *Hill* v. *Texas*, 316 U. S. 400; it has ruled that the right to qualify as a voter, even in primaries, may not be subject to racial classification. "It is too clear for extended argument," said this Court, "that color cannot be made the basis of a statutory classification affecting the right set up in this case" *Nixon* v. *Herndon*, 273 U. S. 536, 541. In a more recent decision, this Court has held that the exclusion of Negroes from voting in a primary election by a political party constituted a denial by the State of the right to vote. *Smith* v. *Allwright*, 321 U. S. 649. This Court has also struck down laws which in their administration have been revealed as a racial classification resulting in the denial to persons of a particular race or color the right to carry on a business or calling, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410.

This Court has protected the right to acquire, use and dispose of real property from infringement by State action effecting race classification. In *Buchanan* v. *Warley*, 245 U. S. 60, which involved a racial residential zoning ordinance, the State invoked its authority to pass laws in the exercise of its police power, and urged that this compulsory separation of the races in habitation be sustained because it would "promote the public peace by preventing race conflicts" (at 81). This Court rejected that contention, saying:

> The authority of the state to pass laws in the exercise of the police power • • • is very broad • • • [and] the exercise of this power is not to be interfered with by the courts where it is within the scope

> of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power * * * cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution * * *. (at 74).

The Court rejected the consideration of the police power of the State, however legitimate the exercise of it, to justify a racial classification where rights created or protected by the Constitution were involved.

In a more recent case, *Shelley* v. *Kraemer*, 334 U. S. 1, this Court, by unanimous decision, held that the enforcement of racial restrictive covenants by State courts is State action, prohibited by the equal protection clause of the Fourteenth Amendment. In the course of its decision, the Court measurably strengthened the equal protection clause as a formidable barrier to restrictions having the effect of racial segregation. The contention was there pressed that since the State courts stand ready to enforce racial covenants excluding white persons from occupancy or ownership, enforcement of covenants excluding Negroes is not a denial of equal protection. This Court rejected the equality of application argument, decisively dismissing it in the following language:

> This contention does not bear scrutiny. * * * The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. (at 21, 22).

There has been but one recent deviation from this trend in civil rights cases. This Court has stated that "in the crisis of war and of threatened invasion" when the national safety is imperilled, it will permit a racial classification by the Federal government. In *Hirabayashi* v. *U. S., supra,* which involved a prosecution for failure to obey a curfew order directed against citizens of Japanese ancestry, and in *Korematsu* v. *U. S., supra,* where a governmental order directing the exclusion of all persons of Japanese ancestry from the West Coast military area was contested, the Court recognized an overriding pressing public urgency in time of war. In doing so it made clear, however, that this was an extraordinary exception. "Legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. * * * We may assume", continued the Court, "that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion" has made necessary this racial classification, which "is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant." *Hirabayashi* v. *U. S., supra,* at 100, 101.

State laws providing for racial segregation in public educational facilities are clearly not accompanied by any "pressing public necessity". Rather, there is a pressing public necessity to give all American citizens their due equality of opportunity to utilize educational facilities established by the state for its inhabitants. The denial of such equality of opportunity serves only to create public unrest and disillusionment on the part of those denied in the strength and honesty of our democratic system of government. It serves also to weaken our efforts to preserve peace and extend democracy abroad by exposing our government's earnest efforts in this direction to a charge of hypocrisy.

It is argued by those who seek to justify racial segregation that this Court's declaration against the constitutionality of State statutes requiring racial segregation would serve to touch off an explosion in some parts of our country. But among those who raise this bogey are many who do so for ulterior reasons, seeking to protect special privileges which they have seized as members of the favored racial group. Further, where segregation has been voluntarily abandoned in State-provided higher education as in Arkansas and Kentucky, the dire results predicted have failed to come to pass. And even if disorder does result, such disorder cannot justify the failure of the State to protect the constitutional rights of all of its citizens. *Terminiello* v. *City of Chicago*, 337 U. S. 1.

It is noteworthy that since the termination of the war our federal courts have gone out of their way to condemn the action of the Army in ousting persons of Japanese ancestry from the West Coast military area solely on the basis of their national origin. *Acheson* v. *Murakami*, 176 F. (2d) 953.

POINT III

The "separate but equal" doctrine originated by this Court in *Plessy* v. *Ferguson* had no basis in then-existing legal precedent, and is an anachronism in the light of present-day legal and sociological knowledge.

Apart from the wartime "national peril" decisions, which are clearly inapplicable here, only one unfavorable precedent exists. This is *Plessy* v. *Ferguson*, which enunciated the "separate but equal" doctrine in 1896. This doctrine maintains that facilities can be constitutionally separate, or segregated, provided there is physical equality.

We have already pointed out that the *Plessy* case, involving railroad transportation, does not apply to questions of public education. But, assuming *arguendo* that *Plessy*

could apply, we submit that the *Plessy* case originally had no basis in legal precedent, and moreover is an anachronism in the light of present-day legal and sociological knowledge. The more recent decisions of this Court affecting racial classification have effectively undermined its authority. In consequence, the *Plessy* case is no longer good law, and is not controlling on the question of the constitutional validity of racial segregation.

Plessy v. *Ferguson* held that a Louisiana "separate-coach" statute requiring "equal accommodations for white and Negro passengers" did not violate the command of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws, because of race or color.

In the *Plessy* decision, three cases were cited as authority for the constitutionality of statutes requiring separation of the two races in "schools, theatres, and railway carriers." None were in point. *Hall* v. *DeCuir*, 95 U. S. 485, was concerned solely with the question of whether a State statute prohibiting segregation was in violation of the Interstate Commerce Clause of the Federal Constitution, and did not deal with the interpretation of the Fourteenth Amendment or its safeguards. The *Civil Rights Cases*, 109 U. S. 3, invalidated the Federal Civil Rights Act of March 1, 1875 on the sole basis that Congress had no authority to pass legislation under the Fourteenth Amendment, which was directed against discrimination by private persons rather than by State action. Finally, *Louisville, New Orleans, and Texas Ry. Co.* v. *Mississippi*, 133 U. S. 587, was another case concerned solely with the effect of the Interstate Commerce Clause on State legislation. It held that a State segregation statute in terms applicable only to intrastate transportation did not unduly burden interstate commerce.

The majority in the *Plessy* case (p. 548) claimed that "statutes for the separation of the two races upon public

conveyances" were held to be constitutional in twelve named cases. An examination of these cases does not support the Court's statement.

The first two cases cited by the Court, *West Chester etc. Ry.* v. *Miles*, 55 Penn St. 209, and *Day* v. *Owens*, 5 Mich. 520, were pre-Civil War decisions, and hence could have set no precedent on the question. The *West Chester* case was a Pennsylvania common law action, which turned upon the reasonableness of segregation under a regulation of the carrier. The majority rested its conclusion on "the law of races, established by the Creator Himself."

Chicago & N. W. Ry. Co. v. *Williams*, 55 Ill. 185, and *Chesapeake, O. & S. Ry. Co.* v. *Wells*, 85 Tenn. 613, although decided after the Fourteenth Amendment was passed, do not contain any discussion of the impact of that Amendment on the question. The Illinois court in the first case merely termed the discrimination unlawful, and awarded damages. In the *Chesapeake* case, the Tennessee court, in a one-paragraph opinion, held that the Railway had acted reasonably under a State statute, and dismissed the complaint. Similarly, in *Houck* v. *Southern Pac. Ry. Co.*, 38 Fed. Rep. 226, the court discussed the facts, and summarily awarded damages without even considering the Fourteenth Amendment.

In *The Sue*, 22 Fed. Rep. 483, *Logwood etc.* v. *Memphis etc. Ry. Co.*, 23 Fed. Rep. 483, and *McGuinn* v. *Forbes*, 37 Fed. Rep. 639, there were involved only discussions of common law principles and private regulations; not of State statutes. *The Sue* was an action in Admiralty, involving transportation facilities employed in public navigable waters between points in Maryland and Virginia. The court held that only the federal government could legislate in this field, but since it had failed to do so, the owners of the boat could adopt such reasonable regulations

as the common law allowed. One of the restrictions imposed by the common law was that "accommodations equal in comfort and safety must be afforded to all alike who pay the same price." Therefore the court's holding that the accommodations offered to the plaintiff, a Negro passenger, were unequal, and its award of damages, was based on an interpretation of common law, not of a State statute.

Logwood etc. v. *Memphis etc. Ry. Co.*, involved intrastate railway transportation. The court simply charged the jury to adopt the rule of *The Sue* as proper law. *McGuinn v. Forbes* was another action in Admiralty involving a steamer travelling between Maryland and Virginia. The holding in the case was that the plaintiff's proof was insufficient to entitle him to a verdict. Again, *The Sue* was cited, and no constitutional issue was raised.

People v. *King*, 110 N. Y. 418, involved a conviction under the New York Penal Code provision *forbidding* discrimination at amusement parks. The provision was sustained against constitutional objection as a valid exercise of the police power, in light of "the War Amendments." Thus this case in no way supports the proposition for which it was cited by the majority. It is interesting to note that Justice Peckham, one of the majority in the *Plessy* case, was on the New York Bench at this time, and dissented without opinion in the *King* case.

The last two cases cited as authority in the *Plessy* majority opinion were Interstate Commerce Commission decisions, and involved the same facts and parties. *Heard* v. *Georgia Ry. Co.*, 1 ICCR 428, was a holding that Section 3 of the Interstate Commerce Act *had* been violated by the discriminatory practices of the defendant. No State statute, and hence no constitutional discussion was involved. *Heard* v. *Georgia Ry. Co.*, 3 ICCR 111, merely reenforced the

prior holding. See, Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn. Law Review 219, 248-251 (March, 1946).

Additional lines of cases cited by the majority in the *Plessy* case involved the existence of "separate schools for white and colored children, which has been held to be a valid exercise of the legislative power * * *" (p. 544), and "Laws forbidding the intermarriage of the two races" (p. 545). There is serious doubt of the validity of laws forbidding the intermarriage of races. The only Supreme Court decision on the subject was *Pace* v. *Alabama*, 106 U. S. 583, which is readily distinguishable as involving an indictment for the crime of "adultery or fornication" between persons of different races; where the statute containing this provision had a lesser punishment for the same crime between persons of the same race. The most recent decision on this subject was a very carefully reasoned one by the highest court of the State of California, which invalidated an anti-miscegenation law as in violation of the Fourteenth Amendment, *Perez* v. *Sharp*, 32 Calif. (2d) 711.

Although many cases have cited the "separate but equal" doctrine of the *Plessy* case, it has never since been reexamined and affirmed by the Court.

The first time the Supreme Court cited the "Plessy doctrine" was in *Atchison, Topeka etc. Ry.* v. *Mathews*, 174 U. S. 96, 105. The holding therein was that the *Plessy* decision did not forbid the imposition of "unequal burdens" on specified corporations; and that the State legislature could validly allow the plaintiff in a suit against the railroads for damages caused by fire, to obtain attorney's fees. Racial discrimination or segregation statutes were not involved in the case.

In *Chesapeake & Ohio Ry.* v. *Kentucky*, 179 U. S. 388, 392, the Court was concerned solely with the application of the Interstate Commerce clause. A Kentucky "separate

coach statute" was construed to apply solely to passengers both embarking and departing from depots within the State; the Court then saying, "and so construing it, there can be no doubt as to its constitutionality. *Plessy* v. *Ferguson.*" Similarly, the *Roanoke*, 189 U. S. 185, 198, dealt primarily with the Interstate Commerce issue. Therein it was held that Congress, and not the states, could legislate regarding certain navigable waterways. The Court distinguished *Plessy* as involving State law "requiring separate carriages for the white and colored races [which] were sustained upon the ground that they applied only between places in the same state." Hence, neither of these decisions in any way validated that part of the majority decision in the *Plessy* case which purported to interpret the Fourteenth Amendment.

Clyatt v. *U. S.*, 197 U. S. 207, 218, cited the *Plessy* case solely to uphold Congressional legislation punishing "the arrest of any person in the Territory of New Mexico to a condition of involuntary servitude" against attack on the grounds that it fell outside the scope of the Thirteenth Amendment. The Court quoted the statement that "this [the Thirteenth] Amendment was said in the Slaughter House Cases to have been primarily intended to abolish slavery * * * but that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name." It was not at all concerned with the Fourteenth Amendment.

The Court in *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71, 77, emphasized the fact that it was dealing with "the act of a private person, to wit, the Railway Co. * * * and we must keep in mind that we are not dealing with the law of a state." The Court thus escaped facing the issue of the Interstate Commerce Clause, as well as the

issue of the Fourteenth Amendment as applied to railroads. On page 77 it quoted from the *Plessy* language the phrase "the established usages, customs and traditions of the people" solely as a "test of reasonableness of the regulations of a carrier."

McCabe v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160, involved the constitutionality of a clause in the Oklahoma "separate-coach statute" which provided that "the provision requiring equal accommodations (earlier in the statute) should not be construed to prevent railway companies from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately or jointly." The defense maintained that the Oklahoma legislature could take note of the fact that the number of Negroes requiring such service did not justify the use of separate facilities in such cars.

The actual holding in the *McCabe* case was that the petitioner failed to show sufficient standing to obtain injunctive relief. However, in addition, the Court rejected the defense argument, saying that it "makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one." By way of further dictum, on page 160, the Court noted that "there was no reason to doubt" the lower court's finding that "it has been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a state to require separate, but equal, accommodations for the two races, *Plessy* v. *Ferguson*." This dictum was not only unnecessary for the decision in the case, but was irrelevant to the constitutional issue, in that by finding a lack of equality, the Court held that the "separate but equal" doctrine spelled out by the majority in the *Plessy* case was inapplicable. Hence there was no need for the Court to re-examine it.

Butler v. *Perry, Sheriff of Columbia County, Fla.*, 240 U. S. 328, 333, was another case which cited the *Plessy* case in connection with the Thirteenth Amendment. The issue involved was the constitutionality of a Florida statute providing that all able bodied men residing in Columbia County would be subject to call to work on the public roads in the county. On page 333 the Court quoted the *Plessy* decision to show that the Thirteenth Amendment was designed "to cover those forms of compulsory labor akin to African slavery, * * * and certainly was not intended to interdict enforcement of those duties which individuals owe to the state."

The case of *Buchanan* v. *Warley*, 245 U. S. 60, 79, *supra*, which cites the *Plessy* opinion, is indicative of the tendency of judicial sentiment to depart from the "separate but equal" doctrine. In that case, the plaintiff, a white landowner, contracted to sell a plot of land to the defendant, a Negro. The defendant refused to pay on the grounds that a city ordinance of Louisville, which prohibited colored persons from occupying houses in a block where the greater number of houses were occupied by whites, made performance of the contract impossible. In holding that this ordinance was in violation of the Fourteenth Amendment; the Court distinguished the *Plessy* case on the ground that in that case a "classification of accommodations was permitted upon the basis of equality for both races." However, the Court did not state that there was inequality in the case before it, but chose to rest its decision on broader grounds. On page 81 the Court said "But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution, such legislation [as upheld in the *Plessy* case] must have its limitation, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us." And again, on

page 76, that "the chief inducement to the passage of the [Fourteenth] Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States."

In *Gong Lum* v. *Rice*, 275 U. S. 78, 86, this Court held that a child of Chinese blood, born in, and a citizen of, the United States, is not denied the equal protection of the laws by being classed by a State among the colored races who are assigned to public schools separate from those provided for the whites, when equal facilities for education are afforded to both classes. The Court was concerned primarily with the problem of construing the *Plessy* doctrine to cover the facts of the case. It relied upon the authority of the old State decisions cited in the *Plessy* case.

Bryant v. *Zimmerman*, 278 U. S. 63, 70, involved a proceeding in habeas corpus in a State court where the detention on a criminal charge was alleged to be in violation of the United States Constitution. This Court cited the *Plessy* case as a holding that such a proceeding is a "suit" within the meaning of the jurisdictional statute, and that an order of the State court of last resort, refusing to discharge the prisoner, is a final judgment in that action, and is, therefore, subject to review. That case, of course, was in no way related to the Fourteenth Amendment.

Similarly, in *Colgate* v. *Harvey*, 296 U. S. 404, 446, the dissenting opinion cited the *Plessy* case only to show the reluctance of the Supreme Court to extend the coverage of the "privileges and immunities" clause of the Fourteenth Amendment.

In *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344, the Court, although talking the language of the *Gong Lum* and *Plessy* cases, found that there was "unequal"

legal instruction afforded in Missouri, and hence did not find it necessary to re-examine the old decisions.

Thus it appears that this Court has never directly affirmed or re-examined the decision in *Plessy* v. *Ferguson*, and that to overrule it now would not result in the overthrow of a well-established line of legal precedents.

Justification for the legislative classification in the *Plessy* case was that it was a valid exercise of the police power of the State, and that it was not discriminatory because it applied equally to both races. As to the exercise of police power, the Court said, at 544,

> Laws permitting, and even requiring, their separation in places where they are likely to be brought into contact * * * have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

This Court has since refused to recognize the police power of the State as a justification for racial legislation. *Buchanan* v. *Warley*, *supra*, is a complete answer (p. 74):

> The police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution.

The principal ground of decision in the *Plessy* case, that there is no discrimination where the separate facilities furnished to both races are on an equal basis, is open to attack on several counts.

In the first place, the *Plessy* case *assumed* that segregated facilities can be equal. As we have shown, the Court has since the *Plessy* case rejected the claim that there is any presumption of constitutionality attaching to such a statute. Rather, it has said that racial classification laws must be viewed with great suspicion and bear

the closest scrutiny. They must overcome the strong inference of unconstitutionality. The Court would not today accept the factual assumption of the *Plessy* case without a showing that it rests upon a reasonable basis.

Second, the fact of discriminatory application of "separate but equal" in the field of education is a knowledge so common and universal, that the Court cannot but dismiss as unfounded the assumption of *Plessy*, and take judicial notice that racial segregation in education, wherever applied, is administered with an unequal hand and is unequal in result.

In Washington, D. C., our national capital, these facts have been demonstrated recently by a survey of the segregated school system in effect there. The survey was conducted pursuant to a request by Congress by a "person qualified by training and experience in the field of public-school education" (62 Stat. 542). Professor George D. Strayer of Columbia University was assisted by a staff of 22 specialists in his study. The findings of the survey are embodied in a report submitted to Congress, *Report of a Survey of the Public Schools of the District of Columbia Conducted Under the Auspices of the Chairmen of the Subcommittees on District of Columbia Appropriations of the Respective Appropriations Committees of the Senate and House of Representatives.* Washington, Government Printing Office, 1949. The facts contained in this report demonstrate beyond doubt the inequality of the white and colored public school systems of the District of Columbia. If efforts to achieve a "separate but equal" segregated school system have failed in our nation's capital where it is subject to the control of our national Congress, can it possibly succeed in those areas where a system of caste and race privilege is deeply intrenched?

Third, the expenditure by a State of its educational funds for racially segregated schooling will necessarily result in inferior quality and quantity of schooling for

both races, than if the same funds are spent for segregated education. "Separate but equal" in education results in an inferiority of facilities for both races.

Legislative classification in educational facilities on the basis of race or color must therefore fall, as constitutionally invalid, as an arbitrary and inadmissible classification under the "equal protection" clause. The racial distinction is "irrelevant and therefore prohibited." It is based upon factors which reflect concepts of racial superiority and inferiority and is thus rendered irrational as a justification under the Constitution. The decision of the major case supporting it was erroneous when originally decided, and has since been implicitly repudiated numerous times by this Court. A final and open repudiation is in order.

POINT IV

Segregation necessarily imports discrimination and therefore violates the requirements of the Fourteenth Amendment.

The State of Texas, by constitutional provision (Art. VII, Sec. 7) and statutory enactment (Revised Civil Statutes, Title 49; Chap. 19, Art. 2900) stipulates that separate schools be provided for white and colored students, "and impartial provision shall be made for both races."

The contention is raised that, since the State law insures physical equality of treatment within a segregated system, no violation of the equal protection of the laws is involved. Where a specific instance of inequality is proven, the remedy should be merely to "equalize",—either by improving the educational facilities for Negroes, or by worsening those for whites to the level provided for Negroes.

This reasoning does not have even a superficial appearance of validity. Inherent therein are the erroneous as-

sumptions that the State may, by virtue of its police power, establish racial classifications, and that there are differences between the two races which warrant making such classification. These contentions are dealt with elsewhere in this brief.

What we are concerned with here is the false assumption that, in the segregation of the races in educational facilities, there *can* be attained the equality of treatment which the Fourteenth Amendment requires. It is our contention that educational facilities for Negroes in segregated areas have never been equal and could not possibly achieve an equality which would satisfy the dictate of the "equal protection" clause of the Fourteenth Amendment.

In *Oyama* v. *California*, 332 U. S. 633, 636, Chief Justice Vinson made it clear that this Court may take cognizance of actual conditions and deal with realities. He said:

> In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are co-mingled.

(1) Equality is in fact impossible in racially segregated public educational facilities.

Wherever racial segregation in education has been required by the State, the physical educational facilities afforded Negroes have been substantially and uniformly inferior and unequal to those enjoyed by whites.

The disparity in physical facilities has been so great and so universally a concomitant of the segregated system that it need hardly be pressed here by extensive documentation.

Expert testimony in the record shows that the State of Texas regularly spends substantially less for Negro than for white education. The total assets of white institutions of higher learning amount to $28.66 for each white person in the State, but the assets of Negro schools amount to only $6.40 per Negro. The whites have almost four and one-half times as much in total educational institutional assets per capita of the population as do the Negroes (R. 244).

In 1943-44, a typical year, Texas appropriated approximately $11,000,000 in State, county and district funds for higher education. Of this amount, about $10,800,000 went to white institutions, or $1.98 per capita of white populations; the balance went to Negro institutions, or the equivalent of 23¢ per capita of Negro population in the State. On this basis, white institutions of higher learning received eight times as much as Negro institutions (R. 246).

The inequality in physical facilities is even far more pervasive than the statistics on appropriations for education by the State indicate. The testimony in the trial court showed that the State of Texas provided a law school for the petitioner by leasing a suite of three rooms and toilet facilities in an office building, after the commencement of the action, for a period beginning March 1, 1947, and ending August 31st of that same year (R. 29, 41), in the semi-basement of the building (R. 88). One room was to be an office and reading room and the other two were intended as classrooms. There was no private office or faculty room for any instructor, for administrative personnel or for a dean (R. 47). Nor was there space for a library consistent with even the minimum needs of a law school. Some 200 text books were available on the premises to serve as a library (R. 21). There was no librarian (R. 96).

There was no provision for scholarships, prizes, participation in the production for the Texas Law Review, participation in the legal aid clinic, or opportunity to join

any honorary law society, such as the Order of the Coif, all of which were features of the School of Law of the University of Texas and consequently available only to white students (R. 103-105).

The faculty of the "school" offered to the petitioner consisted of three instructors assigned part-time from the University of Texas Law School (R. 92-93). Admittedly, the school established for the petitioner did not meet the requirements set by the Association of the American Law Schools for accreditation (R. 92).

The State of Texas contends that this racially segregated law school affords facilities equal to those enjoyed by white students at the University of Texas Law School. But it is quite obvious that the Negro law school cannot possibly afford even a minimal legal education. To claim that it is "equal" to the University of Texas Law School is sheer hypocrisy.

The treatment afforded Mr. Sweatt by the State of Texas is by no means a unique example of the treatment accorded Negroes in educational institutions of the South under the guise of equality of segregated facilities. In every instance of segregation in practice there are provided for Negro citizens fewer educational opportunities, and educational opportunities of poorer quality than are afforded to white citizens. The deficiencies are systematic and all-pervading.

This is not confined to the level of higher education, nor to the State of Texas. The pattern is the same wherever racially segregated schools exist.

In the generation from 1900 to 1930 the disparity between the provision of public educational facilities for white and Negro children, where separate schools are legally mandatory, has increased at a tremendous rate. "In 1900, the disparity in the per capita expenditures upon the two racial groups was *only* 60 per cent in favor of whites, but in 1930 this disparity had increased to 253 per cent." (Thompson, Chas. H., *Court Action the Only*

Reasonable Alternative to Remedy the Immediate Abuses of the Negro Separate School, 4 J. of Negro Ed. 419 (1935)).

For the ten year period, 1918-1928, $270,500,000 was spent on new school facilities by eight Southern states (including Texas) for white children, and $29,500,000 for Negro children. This is a ratio of 9 to 1 in favor of whites on appropriations, against a population ratio of 2 to 1 in favor of whites. (Newbold, N. C., *Common Schools for Negroes in the South,* The Annals of the Amer. Acad. of Polit. & Soc. Science, Vol. 140, No. 229, P. 209, 218, 219 (Nov. 1928)).

Throughout the South there is a wide discrepancy in per capita expenditure for Negro teachers as compared to that for white. For Texas, in 1936, for every $1. spent for teachers' salaries for white students, only 61¢ was expended for teachers' salaries for Negro students. This ratio was the same as the average for the 17 southern states. By 1945, white teachers' salaries were in excess of Negro by 45%. (Boykin, Leander L., *The Status and Trends of Differentials Between White and Negro Teachers' Salaries in the Southern States, 1906-1946,* 18 J. of Negro Ed. 40 (1949)).

There is also a marked inferiority in library facilities in Negro schools. (Thompson, Chas H., *The Critical Situation in Negro Higher and Professional Education,* 15 J. of Negro Ed. 579, 581, 582 (1946)).

As to length of school term, the Negro is again disadvantaged, and especially so in the rural communities of the South. In a survey made for the United States Office of Education in 1935, it was revealed that "the average number of days schools are kept open for Negroes in 17 southern states is 135, which is approximately 1½ months less than the accepted standard in those states. The cumulative effect of this annual loss to Negroes over one school generation of 12 years means a difference of 18 months—or 2 school years." (Caliver, Ambrose, *A*

ability of Education to Negroes in Rural Communities, 34, Office of Education, Dept. of Interior, Bulletin No. 12 (1935)).

In comparison with the physical facilities available to white students, the segregated Negro student suffers from an inadequacy and inequality resulting from the segregation in every category of educational facility, and by every standard of measurement. See, Phelps-Stokes Fund, *Educational Adaptations:* Report of Ten Years' Work, 1910-1920; Johnson, Chas. S., *The Negro in American Civilization* (1930) 261 et seq.; Embree, Edwin R., *Brown America* (1931); Moton, Robert R., *What the Negro Thinks*, 102-108 (1929); *Survey of Higher Education for Negroes*, 14 et seq., U. S. Office of Ed., Misc. No. 6, Vol. II, U. S. Gov't Print. Off., Wash. D. C. (1942); Woofter, Thomas J. Jr., *The Basis of Racial Adjustment*, 176-185 (1925); *The Availability of Education in the Texas Negro Separate School*, 16 J. of Negro Ed. 429 (1947).

The President's Commission on Higher Education, after thorough examination of the facts, found that:

> * * * the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen. (*Higher Education for American Democracy*: Vol. II, Equalizing and Expanding Individual Opportunity 31 (1947).

It might be contended that while educational facilities have been and are, in fact, unequal, equality is nevertheless theoretically possible. There are two answers:

Educational plants, like other physical facilities, deteriorate at varying rates. To maintain physical equality in a segregated educational system, it would be necessary to continually balance the facilities of one system against the other and to take steps to eliminate inequalities which necessarily develop from time to time. This is administratively impossible.

But there is even a more compelling factor which makes physical equality of facilities, without a substantial reduction of facilities now available to whites, a practical impossibility. The financial cost involved is beyond the capacity of the South to bear. Horace Mann Bond, in *Education of the Negro in the American Social Order* (1934) sums this up, at 231:

> If the South had an entirely homogeneous population, it would not be able to maintain schools of high quality for the children unless its states and local communities resorted to heavy, almost crushing rates of taxation. The situation is further complicated by the fact that a dual system is maintained. Considering the expenditures made for Negro schools, it is clear that the plaint frequently made that this dual system *is* a burden is hardly true; but it is also clear that if an honest attempt were made to maintain 'equal, though separate schools', the burden would be impossible even beyond the limitation of existing poverty.

Physical equality can be achieved only when the walls separating the two systems are destroyed and students regardless of race or color, are permitted to use all available educational facilities.

(2) The economic, sociological and psychological consequences of racial segregation in and of themselves constitute a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

Aside from consideration of equality of physical facilities, segregation involves substantial factors which produce a degree of inequality repugnant to the Constitution.

There are discriminatory factors which are present in the very schooling afforded the Negro, which have no relation to the "equality" or adequacy of physical facilities. Dr. Robert Redfield, an education expert, testified in the trial court, to the fact that segregation in education deprives the Negro of the "opportunity to exchange professional and intellectual matters with members of the other major groups" in the nation (R. 200).

Essential to the educational process is the interplay of contributions from all persons and all groups. Full equality in education is not attainable unless all students, regardless of race, have the fullest opportunity to associate intellectually with each other, to express and receive divergent points of view which arise from their differing social backgrounds.

The development of adequate educational facilities for Negroes is greatly handicapped by their isolation from the white community. This is not to mention the deprivation to the white student of intellectual association with the Negro student. Nor are these mutual deprivations an indication of equality. (*Shelley* v. *Kraemer*, 334 U. S. 1, 22, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.")

Education for the legal profession, in particular, requires the highest of standards. The study of law traverses many fields of human knowledge. Yet the Negro relegated to a jim-crow law school finds that there is an insufficient number of students to furnish the broad cross-section of intellectual interests and proficiencies

which are essential ingredients of successful law school training.

Law school classes are most stimulating where they afford ample group discussion. It is a difficult task to attempt to study law alone, as the petitioner is being compelled to do. Even were there a large enrollment at the Negro law school, the facilities for discussion among students would be limited and the Negro student deprived of needed intellectual challenges from white fellow students.

In addition to this, the segregated Negro is deprived of the opportunity of participating with white students in production of their law review, in moot courts and mock trials, in such practice as is afforded by legal aid clinics and public defender societies and in all of the activities outside of the classroom which go to make up a rounded legal education.

Furthermore, the Negro lacks the prestige which comes from being a graduate from accredited and well-known educational institutions. This prestige carries through in later life, especially in professional life, and has a substantial pecuniary value. It is common knowledge that in the eyes of the community, the Negro school has substantially less professional standing than has the "equivalent" white school.

But over and above these considerations, the very existence of segregation is a degrading and humiliating racial discrimination against the Negro, with all its resultant evil effects.

The stamp of inferiority implicit in the segregation is conclusively established in the *mores* of the communities where racial separation is practiced. There is no denying the fact that in those communities the attendance of a white person at a Negro school, or his being seated in the Negro section of a transportation facility (even if the physical equal of any) is not only illegal, but con-

sidered to be degrading and a loss of caste. To ignore this is to ignore the history of community relations in this country.

Moreover, the basic factual assumption upon which the rule in the *Plessy* case was predicated over half a century ago,—that a constitutional degree of equality is possible in racial segregation, is, in the light of modern sociological and psychological data demonstrably false, and was, at all times, utterly without foundation. What the Court then maintained as a fallacious assumption, "that the enforced separation of the two races stamps the colored race with a badge of inferiority" (at 551) is today an uncontroverted scientific fact. Moton, Robert R., *What the Negro Thinks* 99 (1929); Bond, Horace M., *Education of the Negro in the American Social Order* 385 (1934); Gallagher, B. G., *American Caste and the Negro College* (1938); Davis, A. and Dollard, J., *Children of Bondage* (1940).

The consequences of the status of inferiority manifest themselves not only in economic limitations and in social impediments, but also in mental and emotional disturbances and shortcomings in proper personality development. These are discernable and measurable by the social scientist, and are matters of substance and sufficiently material to be given recognition as within the scope and intendment of the "equal protection of the laws" clause of the Fourteenth Amendment.

An excellent and authoritative Note published recently in the *Yale Law Journal* has pointed out that:

> The effects of a dual school system force a sense of limitations upon the child and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy and discourage racial self-appreciation. These abnormal results, condoned by the implications of the *Plessy* case, deny to the Negro and Mexican child "equal protection of the laws' in every meaningful sense of the words.

Segregation in Public Schools—A Violation of "Equal Protection of the Laws", 56 Yale L. J. 1059, 1062 (1947), and authorities therein cited: Long, *Some Psychogenic Hazards of Segregated Education of Negroes*, 4 J. of Negro Ed. 336, 343 (1935); Long, *The Intelligence of Colored Elementary Pupils in Washington, D. C.*, 3 J. of Negro Ed. 205-22 (1934); Gallagher, *American Caste and the Negro College*, 109, 184, 321, 322 (1938).

The offer of equality in physical facilities cannot affect these pernicious factors inherent in segregation. The economic, sociological and psychological consequences to the Negro of segregation of the races, where it is practiced, are actually far more substantially discriminatory than any inequality in physical facilities can ever be. Realistically, the unconstitutional discrimination consists of the inequalities which flow from enforced segregation, rather than the inequality of mere physical facilities.

Conclusion

Racial segregation in our country is a threat to our leadership in international affairs. We have subscribed to international agreements and resolutions which are contradicted by our practices. A continuation of segregation gives the lie to our democratic protestations at a time when our leadership in world affairs is challenged.

Finally, unless racial segregation in education is declared unconstitutional now, we may expect a further crystallization of patterns of discrimination, inasmuch as governors of eleven Southern States are planning to implement a regional compact which will provide higher education for Negroes on a segregated basis.

For the reasons urged herein we respectfully request that the judgment of the Court below be reversed.

Respectfully submitted,

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Dated New York, N. Y., March 31, 1950.

APPENDIX

American Jewish Committee

The American Jewish Committee is a corporation created by an Act of the Legislature of the State of New York in 1906. Its charter states:

> The object of this corporation shall be to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

During the forty-three years of our existence it has been one of the fundamental tenets of our organization that the welfare and security of Jews in America depend upon the preservation of constitutional guarantees. An invasion of the civil rights of any group is a threat to the safety of all groups.

For this reason we have on many occasions fought in defense of civil liberties even though Jewish interests did not appear to be specifically involved. The present case, involving segregation in state-supported educational institutions, is one with which we are deeply concerned because such discrimination deprives millions of persons of rights that are freely enjoyed by others and adversely affects the entire democratic structure of our society. A question of transcendent public importance is thus presented to this Court.

B'nai B'rith (Anti-Defamation League)

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of 300,000 men and women and their families. The Anti-Defamation League was organized in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.